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SUPREME COURT, U.S.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 78-6020

MICHAEL M. BUSIC,

Petitioner,

v.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES.....	
ARGUMENT.....	
Introduction.....	
I. <u>SIMPSON V. UNITED STATES, REQUIRES</u> <u>THAT PETITIONER'S CONVICTION AND</u> <u>SENTENCE UNDER COUNT 18 BE VACATED</u>	
II. <u>PETITIONER CANNOT BE RESENTENCED</u> <u>UNDER ANY COUNTS OF THE INDICTMENT</u>	
CONCLUSION.....	

TABLE OF AUTHORITIES

Cases:

<u>Bell v. United States,</u> 349 U.S. 81, 84.....	
<u>Callanan v. United States,</u> 364 U.S. 587, 596.....	
<u>Gore v. United States,</u> 357 U.S. 386 (1958).....	
<u>Ladner v. United States,</u> 358 U.S. 169 (1958).....	
<u>Pinkerton v. United States,</u> 328 U.S. 640 (1946).....	
<u>Simpson v. United States,</u> 425 U.S. 6 (1978).....	
<u>United States v. Addonizio,</u> 442 U.S. 178 (1979).....	

Statutes:

18 U.S.C. § 111.....	
18 U.S.C. § 924(c).....	

Congressional Materials:

114 Cong. Rec. 22231 (1968) at 22232.....	
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ARGUMENT

Introduction

Various propositions of fact and law have been discussed at length in the briefs of the petitioners, Busic and LaRocca, and the reply brief of LaRocca. No attempt is made herein to repeat arguments made previously on behalf of either petitioner. However, there are certain observations which must be made about the contentions of the Government relating to petitioner Busic.

I.
SIMPSON V. UNITED STATES, REQUIRES THAT
PETITIONER'S CONVICTION AND SENTENCE
UNDER COUNT 18 BE VACATED.

The Government correctly points out that the firearm which Busic "carried" was different than the firearm which

LaRocca "used" in his assaults on the Federal agents and that Basic was convicted of aiding and abetting the assaults by LaRocca. Also, Basic was sentenced under the enhanced sentencing provision of 18 U.S.C. § 111.¹

There should not be any misunderstanding about Basic's position. The fundamental contention is that § 924(c) is inapplicable where the underlying federal felony itself contains a sentencing enhancement provision for use of a firearm. The contention is not that Basic has been punished twice for the single use of a single firearm. The contention is that § 924(c) cannot be applied to underlying felonies such as assaults on Federal officers or process servers, armed robberies of the mail or banks, and various other Federal felonies which contain sentencing enhancement provisions. Under this formulation, the distinction between "using" and "carrying" and the number of weapons or the identity of weapons in given counts, are irrelevant.

As noted in the initial briefs, the legislative history of § 924(c), particularly the unmistakable remarks of the sponsor, Representative Poff, clearly support petitioner's position. Moreover, this Court's language and reasoning in Simpson v. United States, 425 U.S. 6 (1978), needed no additions and was quoted verbatim in petitioner's brief.

¹The maximum imprisonment on each of the two counts which Basic could have received for assault without a deadly weapon was 3 years; the maximum imprisonment for use of a deadly or dangerous weapon in each assault was 10 years, 18 U.S.C. § 111. Basic received concurrent sentences of imprisonment for 5 years on Counts 6 and 7.

Representative Poff said:

For the sake of legislative history, it should be noted that my substitute is not intended to apply to title 18, sections 111, 112, or 113 which already define the penalties for the use of a firearm in assaulting officials, with sections 2113 or 2114 concerning armed robberies of the mail or banks, with section 2231 concerning armed assaults upon process servers or with chapter 44 which defines other firearm felonies. 114 Cong. Rec. 22231 (1968) at 22232.

The Government makes several lengthy arguments regarding the legislative history and the reasonable construction of the statute. Giving full weight to the Government's position, at best, there is an ambiguity. Normally, in criminal cases, this Court tends to resolve such ambiguities in favor of lenity. Simpson v. United States, 435 U.S. 6 (1978); Gore v. United States, 357 U.S. 386 (1958); Callanan v. United States, 364 U.S. 587, 596; Ladner v. United States, 358 U.S. 169 (1958); Bell v. United States, 349 U.S. 81, 84. However, even the finding of an ambiguity would require this Court to ignore the statement of the statute's sponsor and to cut back on its own position in Simpson.

II. PETITIONER CANNOT BE RESENTENCED UNDER ANY COUNTS OF THE INDICTMENT.

The Government also contends that this case should be remanded for resentencing in the event that petitioner's positions are upheld. The contention is that petitioner should be resentenced on the § 111 counts (counts 6 and 7) but that the total sentence may not exceed the total sentence previously imposed (30 years total; 20 years on Count 18, consecutive to

the 10 years imposed on other counts).

Preliminarily, it should be noted that the sentence already requires modification of at least ten years because of a recent action in the District Court vacating an earlier conviction for violation of 924(c). Thus, Basic cannot be treated as a repeat offender under § 924(c) and the maximum imprisonment thereunder is 10 years. This is discussed in petitioner LaRocca's reply brief, footnote 17, page .

Petitioner Basic joins in the contentions of LaRocca that the requested relief must be denied because: the Government failed to cross-petition or to otherwise preserve the issue, the resentencing would be contrary to Rule 35 of the Federal Rules of Criminal Procedure, the Due Process clause and the Double Jeopardy clause of the United States Constitution.

Petitioners are not here challenging any conviction or sentence except for the sentence under 924(c) (as to Basic, Count 18). In this Court there is no question raised as to the validity of the convictions or sentence under any other count including the assault counts. Therefore, except as to the questions raised on this appeal by the petitioners as to the single count, all other aspects of the case have been resolved.

It should also be noted that in the District Court and in the Court of Appeals, numerous legal issues were raised by both petitioners challenging the validity of their convictions under the assault and other counts. Because of the concurrent nature of the sentences imposed by the Court

and other factors, a number of serious and potentially valid appellate grounds were abandoned because such contentions seemed to have no effect. Such contentions include the scope of the Pinkerton rule and the sufficiency of the Court's instructions on this issue.²

If the Government's request is followed, in multiple count indictments, it would be difficult for appellants to limit issues or to abandon issues because of the possibility that otherwise closed counts on which probationary or concurrent sentences were imposed could provide the basis for resentencing if there was prosecution error as to other counts. The extent and unfairness of the resulting burdens to litigants and to the courts should be obvious.

It is respectfully submitted that there is no precedent to vacate the sentence on any count of this indictment other than the counts which are challenged by the petitioners. All that has happened here is that the Court's sentencing expectations as to the validity of the sentence under 924(c) may not be correct. This seems to be the other side of the coin from the situation which confronted this Court in U.S. v. Addonizio, 442 U.S. 178 (1979). In that case, the court had expected more lenient parole consideration

²Under the Court's instructions to the jury, Basic could be convicted of assault if LaRocca's assaults were part of the drug conspiracy in which both were involved and if LaRocca's acts were foreseeable. The jury apparently had trouble with this issue because they asked for further guidance on the premise that Basic had not been personally involved in the assaults. See Pinkerton v. United States, 328 U.S. 640 (1946).

for a sentenced defendant. It was held that these disappointed expectations did not provide a basis for collateral relief. The only substantial difference here is that the court expected that all other sentences were valid and the total imprisonment would be longer, rather than shorter as in Addonizio.

CONCLUSION

For the reasons stated in this reply brief and all other briefs submitted on behalf of both petitioners, it is hereby requested that this Honorable Court vacate petitioner Michael M. Busic's conviction under Count 18.

Respectfully submitted,

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February, 1980

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